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No. 91-1030

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1991

PAMELA WITHROW,
Petitioner,

vs

ROBERT ALLEN WILLIAMS, JR.
Respondent.

ON WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
SIXTH CIRCUIT

PETITIONER'S REPLY BRIEF

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TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES.....iii

ARGUMENT

I.

A.

RESPONDENT'S EFFORTS AT DISTINGUISHING STONE FROM MIRANDA DEMONSTRATE THAT RULES STEMMING FROM THE MIRANDA DECISION HAVE NO APPLICATION ON FEDERAL HABEAS REVIEW.....1

B.

PETITIONER HAS RAISED NOTHING IN ITS BRIEF THAT IS NOT FAIRLY CONTAINED WITHIN THE SCOPE OF THE ISSUES RAISED IN THE PETITION.....6

C.

THE RECORD RESPONDENT HAS KINDLY PROVIDED CONFIRMS PETITIONER'S CONCESSION IN THE SIXTH CIRCUIT THAT THE MIRANDA ISSUE WAS EXHAUSTED IN THE STATE COURT PROCEEDINGS.....9

D.

TWO RECENT HABEAS CASES THIS COURT HAS DECIDED SINCE PETITIONER FILED ITS BRIEF APPEAR TO HAVE MINIMAL IMPACT ON THE ISSUES AT HAND.....10

E.

RESPONDENT SEEMS NOT TO CONTEST PETITIONER'S HISTORICAL ARGUMENT THAT THIS COURT HAS EXPANDED THE WRIT OF HABEAS CORPUS FAR BEYOND THE NARROW SCOPE OF REVIEW WHICH CONGRESS HAS AUTHORIZED.....11

F.

"BREVITY IS THE SOUL OF WIT".....13

RELIEF.....15

INDEX OF AUTHORITIES

CASE PAGE

Alderman v United States,
394 US 165 (1969).....2

Brown v Allen,
344 US 443 (1953).....7, 11

Duckworth v Eagan,
492 US 195 (1989).....5

Greer v Miller,
483 US 756 (1987).....7

Harris v New York,
401 US 222 (1971).....5

Mapp v Ohio,
367 US 643 (1961).....11

Miranda v Arizona,
384 US 436 (1966).....1, 4

New York v Quarles,
467 US 649 (1984).....5

Ohio v Johnson,
467 US 493 (1984).....8

Oregon v Hass,
420 US 914 (1974).....5

People v Hill,
429 Mich 382; 415 NW2d 193 (1987).....9

Planned Parenthood v Casey,
___ US ___; 51 CrL 2266, 2307.....13

Sawyer v Whitley,
___ US ___; 51 CrL 2213 (1992).....10

INDEX OF AUTHORITIES

CASE PAGE

Sonicraft, Inc v NLRB,
905 F2d 146 (CA 7, 1990).....8

Stone v Powell,
428 US 465 (1976).....1, 3

United States v Calandra,
414 US 338 (1974).....1

United States v Havens,
446 US 620 (1980).....1

United States v Washington,
431 US 181 (1977).....5

Wright v West,
___ US ___; 51 CrL 2184 (1992).....10

OTHER AUTHORTIES

Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw L Rev 100, 105 (1985)...3

Hamlet, Act II.....13

Lincoln, Address at Gettysburg,
November 19, 1863.....14

Webster's Third New International Dictionary of the English Language (Unabridged), (1966), ...1

STATUTES

US Const, Art III(2).....5

ARGUMENT

In their respective briefs, neither Respondent nor his supporting amici have made any points warranting a full response. However, Petitioner offers the following brief observations:

A.

RESPONDENT'S EFFORTS AT DISTINGUISHING STONE FROM MIRANDA DEMONSTRATE THAT RULES STEMMING FROM THE MIRANDA DECISION HAVE NO APPLICATION ON FEDERAL HABEAS REVIEW.

The central premise of Respondent's argument is that the holding in Stone v Powell, 428 US 465 (1976) does not apply to rules announced in Miranda v Arizona, 384 US 436 (1966), because Stone's treatment of Fourth Amendment claims gives no guidance in the realm of "true" prophylactic rules, such as those found in Miranda. Respondent's Brief, pp 18-20. Of course, as the Fourth Amendment's exclusionary remedy seeks to

prevent violations of the prohibition against unreasonable searches and seizures not by redressing the violation itself, but by removing any incentive the State might have to undertake a violation, it generously overprotects the Fourth Amendment interest at stake: the State may, after all, introduce evidence seized in violation of the Fourth Amendment at trial without violating the Fourth Amendment, see, eg, United States v Havens, 446 US 620 (1980), Alderman v United States, 394 US 165 (1969); cf, United States v Calandra, 414 US 338 (1974), and in Petitioner's view, this makes the Exclusionary Rule a prophylactic rule -- at least in the ordinary sense of the word.[1]

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[1] While the primary thrust of the word is medical, Webster includes among its definitions: "...tending to prevent or ward off: preventive, cautionary." Webster's Third New International Dictionary of the English Language (Unabridged), (1966), p 1818. This usage reflects its roots, from the Greek prophylassein -- to keep guard before, or take precautions against.

If, however, we grant Respondent his distinction for the sake of argument, we see that his attempt to distinguish Miranda claims from the holding in Stone v Powell, 428 US 465 (1976) succeeds only in confirming the truth of Petitioner's argument:

Respondent notes that the exclusionary rule does not remedy Fourth Amendment violations directly, but deters future violations by rendering past violations fruitless; however, he reasons, as Fifth Amendment violations occur not in the police

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[1] Continued

Professor Grano takes the same definitional posture in identifying "prophylactic" rules. Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 Nw L Rev 100, 105 (1985) ("What distinguishes a prophylactic rule from a true constitutional rule is the possibility of violating the former without actually violating the Constitution"). Whether he would describe the Exclusionary Rule as technically "prophylactic" is problematic, but largely beside the point: to the extent that it is not Constitutionally required, a rule of deterrence serves the function, and the goal, of a prophylactic rule.

station, but upon the introduction of a defendant's compelled statements at trial,[2] Miranda violations occur not in the interrogation room, but in the courtroom -- and therefore, Miranda is a "true" prophylactic rule, and Miranda claims do not fit within the rule of Stone v Powell. Unfortunately, following this logic not only leads to precisely the opposite conclusion, but also shows that Miranda was decided incorrectly: if a Fifth Amendment violation of the Constitution occurs only when the evidence is introduced at trial, Respondent's Brief, p 19, and the introduction of a defendant's voluntary

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2 Respondent's Brief, pp 18-20; see also, Brief of Amicus American Bar Association, pp 15-16, Brief of Amicus American Civil Liberties Union, pp 20-23.

Oddly enough, this logic contradicts the reasoning of the majority in Miranda. See, eg, 384 US at 467 ("Today, then, there can be no doubt that the Fifth Amendment privilege [against self-incrimination] is available outside of criminal court proceedings and serves to protect persons in all settings in which their freedom of action is curtailed in any significant way....").

statement does not violate the Constitution, see, eg, New York v Quarles, 467 US 649 (1984); United States v Washington, 431 US 181, 187 (1977); Oregon v Hass, 420 US 914 (1974); Harris v New York, 401 US 222 (1971), then there is no constitutional basis for Miranda in the first place -- and Respondent has effectively conceded that the introduction of a voluntary, Miranda-defective confession does not violate "the Constitution or laws or treaties of the United States." 28 USC 2254(a); US Const, Art III(2). See also, Duckworth v Eagan, 492 US 195, 207-214 (1989)(O'Connor, J, concurring).

Of course, while the logic seems inescapable, Petitioner suspects that this is not Respondent's intent, and looks forward to his further thoughts on the matter at argument.

B.

PETITIONER HAS RAISED NOTHING IN ITS BRIEF THAT IS NOT FAIRLY CONTAINED WITHIN THE SCOPE OF THE ISSUES RAISED IN THE PETITION.

Respondent also claims that most of Petitioner's argument is not fairly within the scope of the issues presented: specifically, Respondent objects to Petitioner's broad alternative argument, concerning the Fifth Amendment application of Stone v Powell, insisting that this Court direct its attention no further than Miranda, and leave the rest of the Fifth Amendment alone. This is quite puzzling, in light of Respondent's further insistence that Miranda lies at the very heart of the Fifth Amendment:[3] if this be the case, then the Court must confront not only whether Stone v Powell should apply to

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3 See, eg, Respondent's Brief, pp 18-23, 26-34; Brief of Amicus American Bar Association, pp 12-20; Brief of Amicus American Civil Liberties Union, pp 15-19.

Miranda claims, but the extent to which Miranda claims themselves involve the Fifth Amendment. And this, in turn, makes Petitioner's broader argument well within the scope of the issues presented[4] --

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4 Rule 14.1(a); see, eg, Greer v Miller, 483 US 756, 761 n 3 (1987).

Oddly enough, Respondent's contrary claim notwithstanding, both the "Questions Presented" section, and the main Argument headings, are virtually identical in the Petition and in Petitioner's brief on the merits. In addition, Respondent appears to have overlooked the concluding paragraph of footnote 3 in the Petition itself.

Respondent's citation to Petitioner's treatment of Stone v Powell in the Sixth Circuit, Respondent's Brief, p 40, also warrants attention -- but not much: as Petitioner argues in its Brief, extending Stone to Miranda claims is "an exercise in elemental logic," Petitioner's Brief, p 88; however, applying it across the full range of Fifth Amendment concerns requires overruling Brown v Allen, 344 US 443 (1953). Since the Sixth Circuit can extend holdings of this Court into areas which logic commends, Petitioner could legitimately argue one point to the Sixth Circuit, and did so. But since the Sixth Circuit cannot overrule Brown v Allen, the Sixth Circuit had no legitimate basis for extending Stone v Powell to bar habeas consideration of the voluntariness of a confession; thus, this issue can only arise in a case before the Court.

As to Respondent's claim that it did not prejudice Petitioner's ability to litigate the question of involuntariness for

although, as Petitioner noted in its Brief, the issue is not necessary to decide the case, and the Court need address this point only if it chooses to do so.[5]

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4 Continued
Respondent to fail to raise the issue in his habeas petition, or for the District Judge to grant a surprise "amendment of the petition" at the time she issued her opinion, Respondent's Brief, pp 41-42, n 22, Petitioner finds it "merciful to pass over [the point] in silence." Sonicraft, Inc v NLRB, 905 F2d 146, 150 (CA 7, 1990).

5 In addition, though Respondent appears to disagree, it seems to Petitioner that this Court is better served by having the parties fully ventilate an area of the law, prior to its issuing an opinion of far-reaching consequences, rather than by limiting the litigants to the narrowest pigeon hole their opponent finds acceptable. To paraphrase Chief Justice Rehnquist, the Law, unlike an amoeba, cannot be infinitely subdivided. Cf, Ohio v Johnson, 467 US 493, 501 (1984).

Petitioner notes that the solution to a jigsaw puzzle is not always found by concentrating on little bits and pieces; often, one must stand back and look at the entire picture to make sense out of the problem. And when the author approaches the I-80 exit on southbound I-75, he finds it helpful to know whether his intended destination is Washington, Miami, or Los Angeles before deciding which way to go. Respondent does the country a disservice by pretending that the proper way to present a case to this Court is to limit the Court's perspective, rather than striving to enlighten it.

C.

THE RECORD RESPONDENT HAS KINDLY PROVIDED CONFIRMS PETITIONER'S CONCESSION IN THE SIXTH CIRCUIT THAT THE MIRANDA ISSUE WAS EXHAUSTED IN THE STATE COURT PROCEEDINGS.

Petitioner is grateful to Respondent for providing the record of oral argument before the Sixth Circuit. As Respondent's Brief demonstrates, pp 42-43, counsel for Petitioner made no concession about the voluntariness of Respondent's statements at oral argument, or the exhaustion of the issue in the state court, and the Sixth Circuit erred in proceeding on the opposite assumption.[6] This should settle the point once and for all.

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6 Respondent himself appears to misread the passage he has cited: directed to turn his attention to the exhaustion issue in the context of the "custody" issue, counsel replied by recounting the State court controversy over the focus-custody aspect of Miranda, cf, People v Hill, 429 Mich 382; 415 NW2d 193 (1987), cited Miranda specifically, and acknowledged that the court could consider that issue exhausted. Petitioner sees nothing about voluntariness -- or about the Fifth Amendment generally --

D.

TWO RECENT HABEAS CASES THIS COURT HAS DECIDED SINCE PETITIONER FILED ITS BRIEF APPEAR TO HAVE MINIMAL IMPACT ON THE ISSUES AT HAND.

Since Petitioner filed its brief, this Court has issued two opinions dealing with the subject of federal habeas: Wright v West, ___ US ___; 51 CrL 2184 (1992) and Sawyer v Whitley, ___ US ___; 51 CrL 2213 (1992). Neither case appears of particular relevance to the instant case -- except that the fractured decision in Wright demonstrates that this Court is still grappling with a number of conceptual problems in the area, which vanish when put

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6 Continued
mentioned at all, and given the factual posture of the case, construing counsel's concession as Respondent insists it must be taken strikes Petitioner as unreasonable.

In any case, as long as the record is available, the Court might find it enlightening to listen to another passage from the argument -- between counsel and the author of the Sixth Circuit opinion, concerning the appropriate level of federal court intrusion into the daily operation of local police agencies under our federal system of government. Though it has nothing to do with the questions presently at issue, the Court might find the discussion educational.

into perspective.[7]

E.

RESPONDENT SEEMS NOT TO CONTEST PETITIONER'S HISTORICAL ARGUMENT THAT THIS COURT HAS EXPANDED THE WRIT OF HABEAS CORPUS FAR BEYOND THE NARROW SCOPE OF REVIEW WHICH CONGRESS HAS AUTHORIZED.

Neither Respondent, nor Respondent's amici, have chosen to consult History in support of their arguments -- and, Petitioner notes, with good reason:

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7 In Wright, for example, Justices Thomas and O'Connor engage in an interesting historical debate over the degree of deference given to state court judgments in the days before Brown v Allen, 344 US 443 (1953) -- but both agree that prior to Brown, federal review of state court criminal convictions was quite limited. Petitioner's only comment is that if this limited review was what Congress authorized, this Court's subsequent wide-scale alteration of the scope of procedural rights available to state criminal defendants in the wake of Mapp v Ohio, 367 US 643 (1961) cannot effect an amendment of the statute, for under our Constitution the Court has no legislative power. Accordingly, the original meaning of the statute remains unaltered, and should still control: a court could not, after all, alter the historical meaning of a statute prohibiting "armed robbery" by reformulating "robbery"

Respondent claims, for example, that Petitioner's "historical claims are easily answered," Respondent's Brief, p 35, but nonetheless supplies no answer. The fact is that this Court currently has an inaccurate understanding of the term "habeas corpus" as employed by Congress in 1867, and reenacted since then, and now confuses it with a "writ of error." Similarly, the phrase "Constitution or laws or treaties of the United States," had a discernible historical meaning when enacted -- and its proper meaning differs from the common construction placed upon it today. As Petitioner tried to show in its brief, History demonstrates this -- and this, in turn, is probably why Respondent prefers to discuss other matters, instead.

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8 Continued
to mean "the state of being named Robert," and "armed" to mean "having one or more unamputated arms." Therefore, both Justices are correct, up to a point; but the conclusions to be drawn are not limited to those at issue in Wright.

F.

"BREVITY IS THE SOUL OF WIT."[8]

Lastly, at the risk of appearing boorish,[9] Petitioner observes that Respondent has devoted a large portion of his argument to criticizing the space allocations in Petitioner's Brief.[10] Given Respondent's lack of cogent refutation on any of the substantive points at issue, Petitioner takes this as a compliment to the force of its logic, and the persuasive power of its ideas.

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8 Hamlet, II, ii, 90.

9 But see, Planned Parenthood v Casey, ___ US ___; 51 CrL 2266, 2307 (1992)(Scalia, J, dissenting)(Noting that there are some things which are "beyond human nature to leave unanswered").

10 Among the examples of this odd form of advocacy, Respondent chastises Petitioner for the brevity of Arguments II and III, the length of counsel's labors in recounting eight centuries of habeas corpus jurisprudence for the Court, and the fact that the section of Petitioner's brief explaining why this Court should apply Stone v Powell to Miranda cases -- in light of the same eight centuries of jurisprudence just recounted -- was "only five pages" long.

10 Continued
Respondent's Brief, pp 14, 35, 38-41, 45.

Petitioner's only response is that counsel happens to concur with Rule 24.3, directing attorneys to make their briefs "as short as possible" -- and, unlike Respondent, tries to evaluate an argument by its wisdom, rather than its length. The length of an argument should, after all, reflect its complexity -- and complexity is not a necessary correlate of merit. Space devoted to a given point will also reflect the author's editorial judgment about the importance or difficulty of making relevant points in a matter which the Court will find interesting, intelligible, and illuminating: simple points may be stated simply; obscure points may need additional explanation. And as Petitioner's counsel cannot improve upon the reasoning of Justice O'Connor's concurring opinion in Duckworth, it seems like a waste of time and space to dwell upon the obvious. Furthermore, while Petitioner's counsel is no Lincoln, his topic is far more prosaic; and for all his faults and limitations, counsel is proud of the fact that in explaining why a defendant who did not appeal an issue did not exhaust his state remedies relating to that issue, for example, he needed only 100 words more than Lincoln did to recall the purpose and promise of the American experiment in self-government, mourn the thousands who fell at Gettysburg, and issue a call to arms to save the Union. Lincoln, Address at Gettysburg, November 19, 1863.

As for the common fallacy of mistaking the length of an argument for its merit, it is reputed that Lincoln once complemented a brother lawyer for being able to "compress the most words into the smallest ideas better than any man I ever met." Counsel suspects that this Court's experience may be similar, providing the rationale for the page limitations of Rule 24.3.

RELIEF

WHEREFORE, Petitioner prays that this Court reverse the holding of the Sixth Circuit Court of Appeals, and reinstate Respondent's state court conviction for first-degree murder.

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